
(2012) 01 P&H CK 0063

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 2143 of 1989

Tahsildar (Sales), Gurgaon and Another

APPELLANT

Vs

Roshan Lal and Others

RESPONDENT

Date of Decision : 03-01-2012

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 27, 28, 4(1), 46, 7
Civil Procedure Code, 1908 (CPC) — Section 80, 9
Constitution of India, 1950 — Article 226
Displaced Persons (Compensation and Rehabilitation) Act, 1954 — Section 27, 36
Waqf Act, 1954 — Section 52
Waqf Act, 1995 — Section 6(1), 7(5), 83, 85

Citation : AIR 2012 P&H 42

Hon'ble Judges : G.S. Sandhawalia, J

Bench : Single Bench

Advocate : Vinod Bhardwaj, A.A.G, for the Appellant; Anil Bansal, J.S. Bhatia and G.S. Bhatia, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Sandhawalia, J.—The present Regular Second Appeal has been preferred by the State of Haryana against the judgment and decree dated 19.9.1988; whereby suit for permanent injunction of the plaintiffs was decreed and the said judgment and decree has been upheld in appeal by the Addl. District Judge, Gurgaon vide judgment and decree dated 15.5.1989. The case of the plaintiffs-respondents was that they were in possession of 4 kanals 13 marlas of land comprised in Khewat No. 931 Khata No. 1143 Khasra No. 302 situated in the revenue estate of village Jharsa, District Gurgaon as tenant under the Punjab Wakf Board. Ambala Cantt. and the Board had granted a patta in favour of the plaintiffs. It was alleged that in view of the some wrong entries in the revenue record in the column of ownership, the defendants were putting the suit land to auction by way of open bid and had issued a notice for auction of the same and auction had been fixed for 10.11.1983. The said suit was resisted by the State-

appellants initially on various grounds including non-joinder of necessary parties which led to the Punjab Wakf Board being impleaded as defendant No. 3 and amended plaint and written statement came to be filed wherein the jurisdiction to try the suit as envisaged under Sections 36 and 46 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 was challenged. It was contended on merits that the suit property had been owned by Muslim evacuees and after the migration the same vested in the custodian by operation of law and thus the jurisdiction of the Civil Court was barred for deciding the question of title. It was further alleged that the Punjab Wakf Board had no right, title or interest in the suit property and the defendants were fully competent to dispose it of in accordance with rules and law and the auction had not been held because of the stay granted by the Court. It is alleged that the suit land was agricultural land and was not being used as Kabristan.

2. The Punjab Wakf Board admitted the claim of the plaintiffs and contended that the Board had granted lease in favour of the plaintiffs and the defendant-State had no right to auction the suit property. The replication to the written statement filed by defendant Nos. 1 and 2 was filed reiterating the version in the plaint.

3. On the basis of pleadings the following issues came to be framed:

1. Whether the plaintiffs are in possession of the suit land as alleged?OPP
2. Whether the Punjab Wakf Board, defendant No. 3 is owner of the property as alleged?OPP
3. Whether the civil court has no jurisdiction?OPD
4. Whether the suit is liable to be dismissed for want of notice u/S. 80. CPC?OPD
5. Relief.

4. The plaintiffs had examined as many as four witnesses to prove his possession whereas defendant-Punjab Wakf Board had examined Jamshed Alam as DW-1 and the State examined none. The trial Court after taking into account the pleadings and the evidence on record came to the conclusion that it was proved that the plaintiffs were in possession and there was a lease in its favour executed by the Punjab Wakf Board and after examining the revenue record noticed that the plaintiffs name appeared in the Jamabandi for the year 1971-72 and the entries were also shown in the Jamabandi which was tendered into evidence by the defendants and, thus, decided the factum of possession of the plaintiffs in their favour. Regarding issue of ownership, the trial Court recorded that there was notification dated 22.9.1970 Ex. DX. in favour of the Punjab Wakf Board and that in Jamabandi the suit land was described as gairmumkin Kabristan. It also noticed that in the Jamabandi Ex. D1 to Ex.D5 in the column of ownership "Arazi Matruka Billa Alot Shuda" was recorded which showed that since 1961-62 the property was recorded as evacuee property. However, taking into consideration Section 7 of the Administration of Evacuee Property Act, 1950 (hereinafter referred to "the Act, 1950"), it came to the conclusion that there was no

evidence on the record to show that the property had been declared as evacuee property and neither any enquiry had been conducted or any declaration made. The entries in the revenue record were taken into consideration but since they were rebuttable in nature and, accordingly, held that the property in question was owned by the Punjab Wakf Board.

5. That on the contentious issue of jurisdiction of the Court it was held that since the property had never been declared as evacuee property, the bar u/s 46 of the 1950 Act did not apply. Similarly the bar u/s 36 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 was also held to be not applicable as no order of the authority was under challenge. The suit being emergent in nature, the dispensing with the notice under the provisions of Section 80, C.P.C. was also held justified and the suit was decreed for permanent injunction.

6. The State being aggrieved with the judgment and decree filed an appeal before the District Judge. Gurgaon along with application for condonation of delay which was opposed by filing the reply. The Addl. District Judge. Gurgaon vide judgment and decree dated 15.5.1989 has dismissed the appeal both on the question of limitation and has also touched the merits though briefly. A perusal of the judgment of the Lower Appellate Court goes on to show that the judgment by the trial Court was pronounced on 19.9.1988 and certified copy thereof was applied for two days later on i.e. 21.9.1988 and same was prepared on 30.9.1988. The delivery was taken on 3.10.1988 and the limitation to file the appeal expired on 29.10.1988 but the appeal came to be filed on 23.12.1988 after lapse of about two months. Accordingly. it was held that the delay of each day had not been explained and, therefore, the delay was not liable to be condoned. The appeal was, accordingly, dismissed as time barred. On merits, the learned Lower Appellate Court came to the conclusion that there was no enquiry u/s 7 of the 1950 Act which would have given the custodian, dominion over the property and the revenue record showed that" the land stands recorded in the name of Ahle Islam and the plaintiffs were in possession since 1971-72 and there was a notification in favour of the Punjab Wakf Board. Notice was also made of the Jamabandi for the year 1961-62 where the land was recorded as evacuee property but since there was no notice or reference of the custodian, therefore, the appeal had been dismissed.

7. The State has placed on record various substantial questions of law and with the assistance of the State counsel two main questions which arise for decision are as under:

1. Whether the jurisdiction of Civil Court was barred as question of title was involved?

2. Whether the Wakf Tribunal would have jurisdiction to decide the issue of ownership?

8. From a perusal of the judgments of the Courts below go on to show that the State has not brought on record any material whereby declaration had been

issued u/s 7 of the 1950 Act after causing notice to the persons interested and under subsection (3) by publication in the official gazette of the property which was declared to be evacuee property under sub-section (1) of Section 7. Once this exercise had not been carried out, it could not be argued by the State that land was evacuee property. The trial Court has, thus, rightly placed reliance upon the binding precedent of judgment of Hon'ble Supreme Court in Dr. Rajendra Prakash Sharma v. Cyan Chandra and others AIR 1980 SC 1206. Merely because there was an entry in the revenue record that would not vest the property in the custodian and give it title. Similar, the Lower Appellate Court has also noticed this fact and also taken into consideration that there is a notification in favour of the Punjab Wakf Board u/s 52 of the Wakf Act. 1954. The Hon'ble Supreme Court while considering the provisions of Section 46 of the 1950 Act and Section 27 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 in Dr. Rajendra Prakash Sharma's case (supra) held that the bar under the said Act would only arise where the custodian had declared the property as evacuee property after taking the proceedings u/s 7 of the 1950 Act. It was further held that for the bar to operate under the provisions of Displaced Persons (Compensation and Rehabilitation) Act, 1954 only that property which was evacuee property and formed part of the compensation pool could not be adjudicated upon, by the Civil Court. Relevant portion of the said judgment is reproduced below:--

27. The scope of Sections 28 and 46 of the 1950 Act came up for consideration before this Court in Custodian of Evacuee Property Punjab and Others Vs. Jafran Begum, The facts of that case were that a person who was in possession of a house in India, migrated to Pakistan. Notice was issued to his son under S. 7 of the Administration of Evacuee Property Act, 1950, and after hearing him the Deputy Custodian declared the house to be evacuee property. Jafran Begum, who was the mother of the evacuee and on whom the notice under S. 7 of the Act was not served, started proceedings before the Custodian, claiming that the owner of the house had executed a will bequeathing the property to her and so the property could not be declared evacuee property. That application was dismissed by the Custodian. When she failed before the authorities constituted under the Act. she filed a suit in the civil court basing her case on the will and prayed for a permanent injunction restraining the authorities from evicting her from the house. On the question of jurisdiction being raised, the High Court held that determination of a complicated question of law relating to title by authorities under the 1950 Act was not final and could be reopened in the civil court, and section 46 did not bar the civil court's jurisdiction to entertain such a question. After examining the scheme of the 1950 Act, Wanchoo, C.J., speaking for the Bench constituted by three learned Judges. laid down the law, thus:

(Where) the question whether certain properties are evacuee properties has been decided under S. 7 etc., whether that decision is based on issues of fact or issues of law, jurisdiction of courts is clearly barred under S. 46 (a). It is difficult to see how a distinction can be drawn between decisions under S. 7 based on

questions of fact and decisions based on questions of law. The decision is made final whether based on issues of law or of fact by S. 28 and Section 46 bars the jurisdiction of civil and revenue courts in matters which are decided under S. 7 whatever may be the basis of decision, whether issues of fact or of law and whether simple or complicated.

(Emphasis supplied)

... S. 46 is a complete bar to the jurisdiction of civil or revenue courts in any matter which can be decided under S. 7. This conclusion is reinforced by the provision contained in S. 4(1) of the Act which provides that the Act overrides other laws and would thus override S. 9 of the CPC on a combined reading of Ss. 4, 28 and 46. (But).... S. 46 or S. 28 cannot bar the jurisdiction of the High Court under Art. 226 of the Constitution.

(Emphasis supplied)

From the crucial words underlined in the above extract, it is clear that even according to the rule of the above decision Section 46 will not bar the jurisdiction of the civil court where the Custodian has never declared the property as evacuee property after taking proceedings u/s 7 of the 1950 Act.

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38. Same argument was made by the learned counsel for the appellant that the only remedy of the respondents was to prefer an appeal or revision under the aforesaid provisions of this Act; and that since they did not avail of the same u/s 27. the sale made by the managing officer in favour of the plaintiff-appellant has become final and cannot be questioned in any court. Sec. 27 reads thus:

27. Finality of orders.-- Save as otherwise expressly provided in this Act, every order made by any officer or authority under this Act. including a managing corporation, shall be final and shall not be called in question in any court by way of an appeal or revision or in any original suit, application or execution proceeding.

39. It will be seen that Section 27 is not attracted because the plaintiff, who filed the original suit and is now coming before us by way of appeal, is not questioning the finality of the order of the sale alleged to have been made by the managing officer. It is the defendant-respondents who are resisting the plaintiff's claim on the ground that the sale is a nullity. It would not be made under this Act of 1954 for the reason that it was never declared evacuee property u/s 7 of the Act and thus never formed part of the compensation pool. The words "under this Act" occurring in Section 27 are significant.

They show that those orders which are not made by any officer or authority in accordance with the provisions of this Act, but outside the provisions of this Act in excess of jurisdiction, can be called in question in the civil court. It may be noted that the language of Section 27 is not as wide as that of Sec. 46 of the

1950 Act.

9. Accordingly, in view of the above binding principle, the first question is thus, answered against the State by holding that the jurisdiction of the Civil Court was not barred for entertaining the suit for permanent injunction, since there was no evidence on the record of the case which the State produced that the property in dispute has been declared evacuee property.

10. That the next contention of the State that since question of title was involved then the Wakf Board would have the right to adjudicate on the property in view of Ramesh Gobindram (dead) through Lrs. Vs. Sugra Humayun Mirza Wakf, is also of no force. That in the present case, the suit was filed on 7.11.1983. and the Wakf Act, 1995 came into force from 1.1.1996. That under the provisions of the said Act, it is specifically provided that any proceedings which are pending before the Civil Court or which are the subject-matter of any appeal before the commencement of this Act, the Tribunal shall not have jurisdiction to determine the subject-matter of such suit. Provisions of Section 7(5) of the Wakf Act, 1995 are reproduced below:

7. Power of Tribunal to determine disputes regarding wakfs:-- (1) If, after the commencement of this act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:

Provided that --

(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs; and

(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not reopen such question.

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(5) The Tribunal shall not have jurisdiction by reason to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for

revision or review arising out of such suit, proceeding or appeal, as the case may be.

11. A perusal of the above said Section goes to show that matter which is pending in any suit before the commencement of the Act or which is the subject-matter of an appeal, there would be no bar for the Civil Court to decide such issues. This view has also been taken by Hon'ble the Supreme Court in *Sardar Khan and Others Vs. Syed Najmul Hasan (Seth) and Others*, Relevant paragraphs of the said judgment are reproduced below:

12. In exercise of power u/s 83 of the Act, the Wakf Tribunal was constituted on 23.2.1997.

By virtue of sub-section (5) of Section 7, it clearly transpires that the Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a Civil Court under sub-section (1) of Section 6, before the commencement of this Act, i.e., if any suit has been instituted in any Civil Court prior to coming into force of the Wakf Act, 1995, then the Tribunal will have no jurisdiction to decide such matter and it will be continued and concluded as if Act has not come into force.

13. Now coming to the facts of the present case, it is an admitted fact that suit was filed on 19.12.1976 before Addl. District Judge. Jaipur and arguments were heard and judgment was reserved on 16.12.1995 and the judgment was delivered on 23.1.1996 against which the appeal was filed before the High Court on 1.3.1996. Therefore, from these facts it is clear that the suit was pending since 19.12.1976. i.e., prior to the commencement of the Act, i.e., 1.1.1996. Therefore, by virtue of sub-section (5) of Section 7, the Tribunal will have no jurisdiction to decide the suit or the appeal arising from that suit. In the present case, the appeal which was filed by the Respondents (herein) arises out of the judgment and decree passed by the Addl. District Judge, Jaipur on 23.1.1996 in a suit filed on 19.12.1976. Therefore, the appeal which was filed before the High Court against the judgment and decree passed on 23.1.1996 by the Addl. District Judge, Jaipur, will not be governed by this Act. By sub-section (5) of Section 7, a special provision has been made that on pending suit or proceeding or appeal or review or revision, the Act will not be applicable. In the case of *Syed Inamul Haq Shah (supra)*, the learned single Judge only considered the effect of Section 85 but did not examine the effect of sub-section (5) of Section 7 and, on the basis of Section 85, it was held that all the proceedings which were pending before the Civil Court, the Civil Court will have no jurisdiction. With great respect, perhaps the attention of the learned single Judge was not drawn to sub-section (5) of Section 7 which specifically provides an exception that this will not be applicable to the pending suits, appeals and revisions. It has purpose behind it that when Act was made prospective, how can it operate retrospectively, therefore, all pending matters were taken out from purview of this Act.

14. On a conjoint reading of sub-section (5) of Section 7 and Section 85, the

result would be that the Act will not be applicable to the pending suits or proceedings or appeals or revisions which have commenced prior to 1.1.1996. i.e.. coming into force of the Wakf Act. 1995. Therefore, the view taken by the learned single Judge was not correct in the case of Syed Inamul Haq Shah (AIR 2001 Raj 191 (supra)). Hence, in view of the above discussion, we are of the view that the learned single Judge has gone wrong in relying on the decision rendered by the single Judge in the case of Syed Inamul Haq Shah (supra). Consequently, the impugned order passed by the learned single Judge is set aside and the matter is remitted back to the High Court for deciding the appeal in accordance with law, expeditiously.

12. Accordingly, in view of the settled position of law that pending proceeding would not be referred to the Wakf Tribunal, the second question is also decided against the State. Accordingly, the above said appeal is dismissed by answering both the substantial questions of law in favour of the respondents and against the appellants.